

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THOMAS ROSENBERG *et al.*, on behalf of
themselves and classes of those similarly situated,

Plaintiffs,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

Case No. CV 06-00430 PJH

**STIPULATION AND
[PROPOSED] ORDER
REGARDING CASE SCHEDULE,
TOLLING OF FLSA STATUTE OF
LIMITATIONS, AND POTENTIAL
COLLECTIVE ACTION MEMBER
CONTACT INFORMATION**

This Stipulation is entered into by and between Thomas Roseburg, John Shelly, James Baxter, Sherry Mattson, Steve Park, Fnu Kennedy, and Exaldo Topacio ("Plaintiffs"), by and through their undersigned counsel, and International Business Machines Corporation ("IBM" or the "Company"), by and through its undersigned counsel. Plaintiffs and the Company are collectively referred to herein as the "Parties."

RECITALS

WHEREAS, Plaintiffs have filed an action in the United States District Court for the Northern District of California styled Thomas Rosenberg et al. v. International Business Machines Corp., Case No. 06-0430 PJH;

WHEREAS, Plaintiffs claim, among other things, that the Company has misclassified Plaintiffs as exempt from overtime requirements under the Fair Labor Standards Act ("FLSA")

1 and, as a result, has not provided overtime compensation for overtime hours worked ("FLSA
2 Claims");

3 WHEREAS, Plaintiffs seek to bring a nationwide FLSA collective action on behalf of
4 "technical support workers with the primary duty of installing, maintaining and/or supporting
5 computer software and/or hardware . . . who were, are, or will be classified by IBM as exempt
6 from overtime pay under federal law" ("Prospective FLSA Collective Action");

7 WHEREAS, Plaintiffs all hold and/or held the position title of Technical Services
8 Professional, which position was classified by the IBM position code 499A ("499A Position"), or
9 a predecessor position code, in band 6, 7, or 8;

10 WHEREAS, the only predecessor position codes to the 499A Position were 498Q ("498Q
11 Position"), 498R ("498R Position"), 498S ("498S Position"), 498T ("498T Position"), and 498U
12 ("498U Position");

13 WHEREAS, Plaintiffs have indicated that the proposed FLSA class might also encompass
14 position code 5968 ("5968 Position"), bands 6-8 of position code 594J ("594J Position"), and
15 position code 5338 ("5338 Position");

16 WHEREAS, Plaintiffs have requested and the Company has agreed to produce, subject to
17 the terms of this Stipulation and Order, (a) the full name and (b) full current or last known home
18 address of any current or former employee of the Company who worked in any one of the
19 following positions at any time between January 24, 2003 and April 20, 2006: bands 6-8 of the
20 499A Position; bands 6-8 of the 498Q, 498R, 498S, 498T, and 498U Positions; the 5968 Position;
21 bands 6-8 of the 594J Position; and the 5338 Position (hereinafter, the name and address
22 information referred to in this paragraph is called "Contact Information");

23 WHEREAS, the Company denies that it has misclassified as exempt Plaintiffs or other
24 employees or engaged in any other unlawful employment practices and further denies that
25 certification of any potential class or collective action is appropriate;

26 WHEREAS, the Parties have agreed that it is in their mutual interests to attempt to resolve
27 through confidential mediation, scheduled for September 13, 2006, the claims in the above-
28 referenced litigation, including but not limited to the FLSA Claims;

1 WHEREAS, the Parties have also agreed to engage in certain discovery prior to
 2 conducting mediation so that they will be well informed about the facts of the case at the
 3 mediation;

4 WHEREAS, the Parties have agreed that Plaintiffs will not move for conditional
 5 certification of the Prospective FLSA Collective Action for the purpose of issuance of Court-
 6 facilitated notice ("Notice Motion") or move for class certification under F.R.C.P. 23 ("Rule 23
 7 Motion") until after September 28, 2006;

8 THEREFORE, the Parties stipulate and agree as follows:

9 **STIPULATION AND AGREEMENT**

10 1. Plaintiffs will not file a Notice Motion or Rule 23 Motion until after
 11 September 28, 2006.

12 2. The statute of limitations under the FLSA applicable to (a) the Plaintiffs;
 13 (b) employees in bands 6-8 of the 499A Position; (c) employees in bands 6-8 of the 498Q, 498R,
 14 498S, 498T, and 498U Positions; (d) employees in the 5968 Position; (e) employees in bands 6-8
 15 of the 594J Position; and (f) employees in the 5338 Position shall be tolled from April 19, 2006
 16 through September 28, 2006.

17 3. This Stipulation and Order is without prejudice to Plaintiffs moving the
 18 Court, pursuant to the doctrine of equitable tolling, to toll the FLSA statute of limitations for
 19 periods before April 19, 2006 or after September 28, 2006. The Company reserves the right to
 20 oppose any such motion. This Stipulation and Order is also without prejudice to the Parties
 21 reaching agreement about additional tolling.

22 4. This Stipulation and Order will not have the effect of reviving any claims
 23 that were time-barred as of April 19, 2006.

24 5. Within two weeks of the entry of this Stipulation and Order, the Company
 25 will provide the Contact Information to Plaintiffs' counsel.

26 6. Plaintiffs' counsel shall not use the Contact Information to solicit opt-in
 27 filings or to issue notice to potential collective action members concerning "opt-in" joinder rights,
 28

1 unless the Court grants Plaintiffs' Notice Motion and then only to the extent that the Court
2 approves the use of the Contact Information for such purpose.

3 7. Plaintiffs' counsel may, however, use the Contact Information to contact
4 potential collective action members, by mail or otherwise, for discovery and investigation
5 purposes, subject to applicable limitations imposed by law, court order, and/or ethical rules. If
6 any potential collective action members so contacted inquire as to their rights in this case,
7 Plaintiffs' counsel may advise them regarding their legal rights, including but not limited to
8 advising them as to their "opt-in" joinder rights, subject to applicable limitations imposed by law,
9 court order, and/or ethical rules.

10 8. In providing the Contact Information, the Company does not waive its right
11 to oppose any Notice Motion or Rule 23 Motion filed by Plaintiffs or anyone else, nor does the
12 Company concede that any individuals may proceed as a class or collective action.

13 9. Plaintiffs' counsel shall use the Contact Information solely for purposes of
14 prosecuting this case and in accordance with this Stipulation and Order; shall not disclose the
15 Contact Information to anyone other than employees of Plaintiffs' counsel and professional
16 vendors to whom it is reasonably necessary to disclose the Contact Information for purposes of
17 prosecuting this case and in accordance with this Stipulation and Order; shall notify the Company
18 (in writing) immediately or in no event later than three days after receipt of a subpoena or order
19 issued in other litigation that would compel disclosure of the Contact Information; and shall
20 return the Contact Information (including all copies or reproductions) to the Company's counsel
21 within 60 days after the final termination of this action.

22 10. The restrictions on Plaintiffs' counsel's use of the Contact Information
23 contained in this Stipulation and Order shall survive the expiration of the tolling period on
24 September 28, 2006.

25 11. Except as expressly set forth herein, nothing contained in this Stipulation
26 shall constitute a waiver of Plaintiffs' or the Company's legal positions, rights or remedies,
27 including any defense under any statute of limitations or any other defense relating to the passage
28 of time.

1 12. This Stipulation and Order shall not be admissible for any purpose
2 whatsoever, other than for the purpose of enforcing the terms hereof, in any proceeding between
3 the Company and any Plaintiff(s) and/or other individuals for whom the FLSA statute of
4 limitations is tolled pursuant to this Stipulation and Order.

5 13. This Stipulation and Order is not intended as, and shall not be construed to
6 be, an admission by any Party that any other Party has or does not have a valid claim or defense.

7 14. This Stipulation and Order shall not become effective until approved and
8 entered by the Court.

9
10 Dated: May 18, 2006

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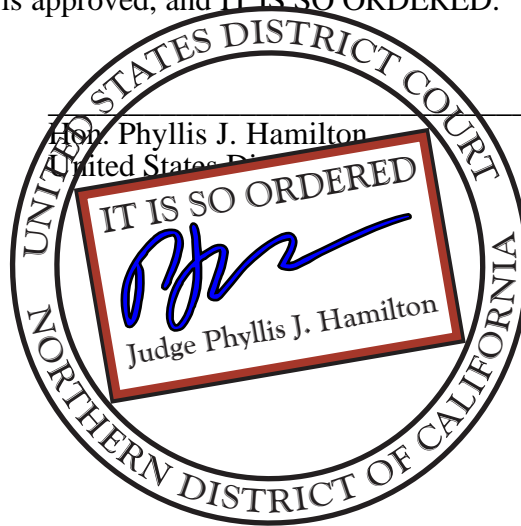
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*Attorneys for Plaintiffs and the proposed
Plaintiff Classes*

ORDER

The foregoing Stipulation is approved, and IT IS SO ORDERED.

DATED: 6/7/06



1 I hereby attest that I have on file all holograph signatures for any signatures indicated by a
2 “conformed” signature (/s/) within this efiled document.

3
4 Date: May 18, 2006

/s/ James M. Finberg
James M. Finberg